Before the
Federal Communications Commission
Washington, D.C. 20554

In Re	)	
	)	
Petition for Declaratory Ruling	)	
and Rulemaking with Respect to	)	
Defining, Predicting, and	)	**RM 9345**
Measuring "Grade B Intensity"	)	
for Purposes of the Satellite	)	
Home Viewer Act	)	

TO: The Commission

MOTION OF THE NATIONAL ASSOCIATION OF BROADCASTERS FOR LEAVE TO FILE SHORT SURREPLY IN OPPOSITION TO ECHOSTAR PETITION FOR RULEMAKING

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Dated: October 28, 1998

The National Association of Broadcasters ("NAB") hereby requests that the Commission accept the following short surreply to EchoStar's Reply filed on October 13, 1998. The surreply addresses a single argument made for the first time by EchoStar in its Reply: that adoption of the bizarre "99%" predictive methodology urged by EchoStar would amount to a routine exercise in agency adoption of a factual "presumption." EchoStar Reply at 7-14.[1/] The truth is just the opposite: as discussed below, the EchoStar proposal, if adopted, would be a textbook study of agency irrationality.

The Presumption that EchoStar Asks the Commission to Create is Irrational and Could Not Survive Judicial Scrutiny

EchoStar invites the Commission to "presume" that anyone outside of an artificially shrunken predicted signal area for a TV station cannot receive a signal of Grade B intensity from that station. EchoStar Reply at 7-14. For example, EchoStar would have the Commission presume that of the 3.9 million viewers predicted by the standard Longley-Rice model to receive a Grade B intensity signal from WXTV in Sacramento, California, at least 1.4 million in fact cannot receive such a signal.[2/] For the reasons discussed below, such a presumption would be irrational even if the Commission had authority to adopt it -- which it does not.

In enacting the SHVA a decade ago, Congress chose to make each household's eligibility to receive network signals by satellite depend on whether that particular household can receive a

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1/ Should the Commission begin a proceeding in response to the EchoStar petition, NAB will respond in detail to the many other mischaracterizations contained in the EchoStar Reply.

2/ See A.H. Belo Corporation Opposition to Petition for Declaratory Ruling And/Or Rulemaking of EchoStar Communications Corporation (Sept. 25, 1998).

signal of Grade B intensity from a local station. 17 U.S.C. § 119(d)(10)(A). And in 1994, Congress strengthened the protection of broadcasters under the SHVA by expressly imposing on satellite carriers the burden of proving that each of their customers does not receive a signal of Grade B intensity. Thus, satellite carriers such as PrimeTime 24 and EchoStar must, by statute, prove that each of their customers cannot receive a signal of Grade B intensity -- which, in a civil lawsuit, means that they must prove it is more likely than not that each customer cannot such a signal.

The question of how satellite carriers can meet their burden of proof has already been resolved: a carrier can meet that burden only by conducting a signal intensity test. See Mem. Op. at 13-18, ABC, Inc. v. PrimeTime 24 (July 16, 1998). But even if (contrary to fact) satellite carriers could meet their burden of proof by other means, the presumption EchoStar invites the Commission to adopt would be irrational.

As one of EchoStar's own cases explains, an agency may adopt a factual presumption of the type advocated by EchoStar only when "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.'" Chemical Mfrs. Ass'n v. Department of Transp., 105 F.3d 702, 705 (D.C. Cir. 1997) (emphasis added). At a minimum, for a presumption about "Grade B intensity" to have any application in civil litigation under the Copyright Act, the presumption would need to be based on sound factual grounds for concluding it is more likely than not that the customer in question cannot receive a signal of Grade B intensity. The presumption advocated by EchoStar falls astronomically short of that standard.

The folly of the EchoStar proposal can be simply illustrated: under the "99%" standard that EchoStar advocates, a household would be presumed to be unable to receive a signal of Grade B intensity *even if there is only a 1.001% probability that the household cannot receive such a signal.* Such an absurd "presumption" could not possibly withstand judicial review. See Chemical Mfrs. Ass'n, 105 F.3d at 705 (agency factual presumption can stand only if there is a "sound and rational connection" between the "proved" facts and the "inferred" facts). Seen from the other direction, it would be preposterous to presume that a household cannot receive a Grade B intensity signal when it is 98.99% likely to receive such a signal. Adoption of the EchoStar "99%" proposal -- or any proposal requiring use of percentages above 50% -- would therefore be indefensible. See United Scenic Artists, Local 829 v. NLRB, 762 F.2d 1027, 1035 (D.C. Cir. 1985) (rejecting irrational presumption adopted by agency, in which proposed "conclusion . . . simply does not follow from the premise"). Any agency effort to alter the results of civil litigation by such a flawed presumption is doomed.[3/]

Even less defensible is EchoStar's apparent suggestion that the FCC could adopt an *irrebuttable* presumption to the same effect. See EchoStar Reply at 7-8 (discussing irrebuttable presumptions). As EchoStar itself has repeatedly acknowledged, the statutory test with respect to each household is whether "*that particular* household can receive an over-the-air signal of [Grade B] intensity from the local network affiliate." EchoStar Pet. at 2. An irrebuttable presumption would mean that a household is conclusively presumed not to be able to receive a signal of Grade B intensity even if a test shows that the household in fact receives a signal far

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[3/] See Chemical Mfrs. Ass'n, 105 F.3d at 707 (noting that agency presumption could not apply to civil litigation in light of contrary federal statute applicable to court cases).

stronger than Grade B intensity. Only Congress, and not the Commission, has the power to rewrite a federal statute to achieve the diametric opposite of the result specified by Congress.[4/]

Conclusion

EchoStar's petition invites the Commission to do precisely what the courts have forbidden agencies to do: establish presumptions based not on a "sound and rational connection" between the "proved" facts and the "inferred" facts, but on the agency's own view about policy matters. See Chemical Mfrs. Ass'n, 105 F.3d at 705 ("unlike a legislative body, which is free to adopt presumptions for policy reasons, an agency may only establish a presumption if there is a sound and rational connection between the proved and inferred facts."); United Scenic Artists, 762 F.2d at 1034 (an agency may not "creat[e] a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found."). No agency has such power -- even if the policy advocated by EchoStar were a sound one, which it demonstrably is not.[5/]

[4/] As the cases cited by EchoStar make clear, agencies have at most the power to adopt rebuttable presumptions, not conclusive presumptions that effectively rewrite statutes. Chemical Mfrs. Ass'n, 105 F.3d at 705 (presumption applies "until the adversary disproves it"). Indeed, in Chemical Manufacturers Ass'n, the agency "only purport[ed] to shift the burden of producing evidence, and not the ultimate burden of proof in the sense of the risk of nonpersuasion." Id. at 706.

[5/] EchoStar would have the Commission promote the policy of giving every advantage to satellite carriers against cable systems, without regard to the legal constraints imposed by the Satellite Home Viewer Act. As we have previously demonstrated, that approach would, over time, decimate the network/affiliate system.

For those reasons, among many others, the Commission should dismiss EchoStar's petition.

Respectfully submitted,

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October 28, 1998

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